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No. 93-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1993

DONALD C. WINSTON

Petitioner,

v.

MAINE TECHNICAL COLLEGE SYSTEM,

CENTRAL MAINE TECHNICAL COLLEGE,

AND

RICHARD CONRATH

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE MAINE SUPREME JUDICIAL COURT

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QUESTIONS PRESENTED

I. Does 29 U.S.C. §706(8)(F) amending the Federal Rehabilitation Act of 1973 to exclude certain impairments from the definition of "individual with a disability" apply retroactively to cases that were pending under Section 504 of the Rehabilitation Act of 1973.

II. Did the Maine Supreme Judicial Court misapply the "manifest injustice" test set out in Bradley v. School Board of Richmond, 416 U.S. 696 (1974), in determining that the application of 29 U.S.C. §706(8)(F) in this case would not result in manifest injustice to the petitioner.

LIST OF PARTIES

The parties are the petitioner Donald C. Winston and the respondents Maine Technical College System, Central Maine Technical College and Richard Conrath.

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RICHARD CONRATH

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE MAINE SUPREME JUDICIAL COURT

Petitioner Donald C. Winston respectfully prays that the Supreme Court grant a writ of certiorari to review the judgment of the Maine Supreme Judicial Court entered on September 1, 1993. The

Maine Supreme Judicial Court denied a timely petition for rehearing on September 28, 1993.

OPINIONS BELOW

The opinion of the Maine Supreme Judicial Court is reported as Donald C. Winston v. Maine Technical College System, et al., 631 A.2d 70 (Me.1993), and is set out at A-1 - A-24 of the Appendix hereto ("App."). The order of the Supreme Judicial Court denying petitioner's motion for reconsideration is not reported and is set out at App. E-1. The opinion of the Maine Superior Court is not reported and is set out at App. F-1 - F-12.

JURISDICTION

The decision of the Maine Supreme Judicial Court was entered on September 1,

1993. Petitioner's timely motion for reconsideration was denied on September 28, 1993. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. §§1257 and 2101(c).

STATUTE INVOLVED

This case involves 29 U.S.C. §706(8)(F), P.L. 102-569, §102, 106 Stat. 4349(1992), which provides in its entirety:

> (F) For the purposes of sections 791, 793, and 794 of this title, the term "individual with a disability" does not include an individual on the basis of -
>
> (i) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
>
> (ii) compulsive gambling, kleptomania, or pyromania; or
>
> (iii) psychoactive substance use disorders resulting from current illegal use of drugs.

STATEMENT OF THE CASE

Petitioner appealed to the Maine Supreme Judicial Court from the Maine Superior Court grant of summary judgment in favor of Respondents. Thus he is entitled to have the facts viewed in the light most favorable to him. Cf. Winston v. Maine Technical College System, 631 A.2d 70, 72 (Me. 1993). Donald C. Winston taught in the Maine Technical College System (formerly the Maine Vocational Technical Institute System) for nineteen years. He was a tenured English instructor at Central Maine Technical College in 1989 when he was terminated. He was accused of, and denies, violating the school's sexual harassment policy. He had engaged in a consensual kiss with an eighteen-year old female student after a sexually suggestive conversation. His condition has been

diagnosed by a psychiatrist and the petitioner's psychotherapist as Impulse Control Disorder Not Otherwise Specified under the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (3d ed. rev. 1987) and labeled sexual addiction. Both stated that the disorder led to his termination, that as an addiction his condition is permanent, but that he is currently capable of performing his job as a teacher, including contact with students, without accommodation. His condition has never resulted in coercive sexual conduct towards others. Deposition of Donald C. Winston, April 29, 1992, passim.

Almost immediately after the kissing incident the petitioner went to Respondent Conrath, Director of the then Central Maine Vocational Technical Institute (now CMTC),

and disclosed that he was "sexually obsessive" and that he had had some involvement with a student, but that he had taken care of it. Twenty days later the student told Conrath that the petitioner had made a pass at her.

The charge was investigated as sexual harassment. At first Conrath assured the petitioner that he was in no danger of losing his job. Arbitration Tr., Vol VII, at 106-07 (admission of the Arbitration transcripts was stipulated to by the parties). During the period of the investigation Director Conrath made numerous references to his concern for petitioner's mental health. In the course of the investigation, Conrath came to believe that the petitioner was "deeply troubled psychologically". After that Conrath came to doubt that he could return

the petitioner to the classroom and his attitude changed. Arb. Tr., Vol X, at 112-113. The school administrators were aware that petitioner had been experiencing a great deal of stress in the years preceding the kissing incident. He had been granted an emergency leave in March 1987 because of personal stress. In the spring of 1987 he had a breakdown in a meeting with the school's Assistant Director. After he found himself seeking out prostitutes in the summer of 1988, he sought psychiatric help and disclosed his concern over this behavior to his Department Chair. Petitioner claims he was discharged because of his mental disability which has been diagnosed as impulse control disorder and labeled sexual addiction. At the time his termination was under consideration, his union attorney requested a psychological

evaluation with a view to rehabilitation. Arb. Exh. 36.

On June 26, 1991, the petitioner filed suit in the Maine Superior Court for, inter alia, discrimination under Section 504 of the Federal Rehabilitation Act of 1973, 29 U.S.C. §794. On November 2, 1992, the Maine Superior Court granted summary judgment for respondents, ruling without citation, essentially simply on its own belief, that petitioner's claimed disability "is not the result of such a significant impairment of mental condition as qualifies him for protection under the various civil rights laws protecting persons with disabilities." App. at F-11 - F-12. It is important to note that the Superior Court based its conclusion on a finding of sexual harassment, App. at F-11, a finding which was not upheld by the

Supreme Judicial Court. Winston, supra, 631 A.2d at 73 (App. at A-8 - A-9).

The Supreme Judicial Court affirmed the Superior Court. It did so, however, on an "issue not raised by the parties," i.e., the application of 29 U.S.C. §706(8)(F) amending the Federal Rehabilitation Act excluding from the term "individual with a disability" an individual on the basis of "sexual behavioral disorders". Id. at 74, App. at A-10 - A-11. The Supreme Judicial Court held that the amendment applied to this case under the presumption created by Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974), which held that "a court is to apply the law in effect at the time it renders its decision...." 416 U.S. at 711. Here the discriminatory conduct took place in 1989, the oral argument on the respondents' Motion for

Summary Judgment before the Superior Court took place October 27, 1992, section 706(8)(F) was effective October 29, 1992 and the Superior Court decision was rendered November 2, 1992. The Supreme Judicial Court by footnote further held that neither of the Bradley exceptions, a clear congressional intent to the contrary or when application would result in "manifest injustice" to a party, Winston, supra, at 74, n.7, App. at A-13, applies here.

Since the decision of the Supreme Judicial Court was based upon an issue raised by it and not raised as a defense to the petitioner's claim in the lower court, the petitioner filed a timely Motion for Reconsideration pursuant to the Maine Rules of Civil Procedure. There the petitioner raised the issue as to whether in this case

involving substantive rights of the petitioner the Supreme Judicial Court erred in applying the amendment retroactively on the basis of the Bradley presumption in stead of applying the contrary presumption of Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988). App. at D-3. The petitioner further raised the issue as to whether even under Bradley the Supreme Judicial Court erred in not applying the amendment prospectively because of manifest injustice. App. at D-10.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE SPLIT BETWEEN THE MAINE SUPREME JUDICIAL COURT AND THE FIRST CIRCUIT COURT OF APPEALS CONCERNING THE APPLICATION OF JUDICIAL PRESUMPTIONS AND THE CONFLICT AMONG THE CIRCUITS CONCERNING THE APPLICATION OF THOSE PRESUMPTIONS.

A. THERE ARE CONFLICTING PRESUMPTIONS IN THIS COURT'S PRIOR DECISIONS.

In this case the Maine Supreme Judicial Court relied upon a presumption it found to be established in Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974), favoring the application of new statutes to pending cases, in applying 29 U.S.C. §706(8)(F) retroactively so as to exclude the petitioner from the category of "individual with a disability" under the Federal Rehabilitation Act. We submit that the Supreme Judicial Court erroneously applied the Bradley presumption in this

case.

In Bradley this Court held that a new statute applies to a pending claim "unless doing so would result in manifest injustice or there is a statutory direction or legislative history to the contrary." Id. at 711. However, in subsequent cases this Court has made rulings in seeming conflict with Bradley. Thus in 1985 in Bennett v. New Jersey, 470 U.S. 632 (1985), this Court expressly rejected the Bradley presumption where substantive rights were affected. The Court concluded that "reliance on such a presumption in this context is inappropriate." Id. at 638. The Court stated: "Both the nature of the obligation ... and Bradley itself suggest that changes in substantive requirements ... should not be presumed to operate retroactively." Id. Bennett noted that Bradley applied a

statutory provision for attorney's fees. Id. at 639. Bennett further noted that Bradley itself expressly acknowledged limits to the retroactivity principle where retroactivity "would injure or deprive a person of a right that has matured or become unconditional." Bradley, supra, at 720. Bennett found agreement of this "with another venerable rule of statutory interpretation, i.e., that statutes affecting substantive rights and liabilities are presumed to have only prospective effect. See, e.g., United States v. Security Industrial Bank, 459 U.S. 70, 79 (1982); Greene v. United States, 376 U.S. 149, 160 (1964). Cf. Bradley, supra, at 721 (noting that statutory change did not affect substantive obligations)." Bennett, supra, at 639-40.

Subsequently in Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988), this Court stated even more succinctly:

> "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. See, e.g, Greene v. United States, 376 U.S. 149, 160 (1964); Claridge Apartments Co. v. Commissioner, 323 U.S. 141, 164 (1944); Miller v. United States, 294 U.S. 435, 439 (1935); United States v. Magnolia Petroleum Co., 276 U.S. 160, 162-163 (1928)."

B. CONFLICT AND CONFUSION IN THE COURTS BELOW ESTABLISHES THE CLEAR NEED FOR THIS COURT TO RESOLVE ITS CONFLICTING PRECEDENTS.

Since Bradley, Bennett and Bowen, in Kaiser Aluminum & Chem. Corp. v. Bonforno,

494 U.S. 827, 837 (1990), this Court has recognized an "apparent tension" between the lines of authority. But it did not resolve the tension there because the statute at issue was clear. That apparent tension has been recognized in the opinions of a number of courts and has generated confusion on the question of applying new statutes to pending cases. A number of those cases involve the Civil Rights Act of 1991, 105 Stat. 1071, P.L. 102-1066. Petitions for certiorari have already been accepted by the Court for review in two of these cases. Landgraf v. USI Film Products, No. 92-757 (5th Cir., cert. petition filed October 28, 1992); Rivers v. Roadway Express, Inc., No. 92-938 (6th Cir., cert. petition filed December 2, 1992). The issue, however, is much broader than the Civil Rights Act and has led to

inconsistent results among jurisdictions with a number of other new statutes. Thus, e.g., the following cases recognized a Bradley/Bowen conflict and, in the absence of reconciliation of the conflict, chose the Bowen presumption against retroactivity. Diaz v. Shallbetter, 984 F.2d 850 (7th Cir. 1993) (Federal Rule change, affected applicability of statute of limitations; opted for Bowen presumption against retroactivity); Hicks v. Brown Group, Inc., 982 F.2d 295 (8th Cir. 1992) (Civil Rights Act of 1991 [CRA]; Court favored nonretroactivity presumption, distinguished Bradley, followed Bennett applying presumption against retroactivity); Simmons v. Lockhart, 931 F.2d 1226 (8th Cir. 1991) (Anti Drug Abuse Act of 1988; found conflict irreconcilable, chose Bowen presumption against

retroactivity); DeVargas v. Mason & Hanger-Silas Mason Co., Inc., 911 F.2d 1377 (10th Cir. 1990), cert. denied, 498 U.S. 1074 (1991) (Civil Rights Restoration Act of 1987 as applied to section 504 of the Federal Rehabilitation Act of 1973; found conflict irreconcilable, "forced to elect", chose Bowen).

The following examples applied Bradley on varying reasoning. Federal Deposit Insurance Corp. v. Longley I Realty Trust, 988 F.2d 270 (1st Cir. 1993) (Financial Institutions Reform, Recovery and Enforcement Act [FIRREA]; notes "tension", applies Bradley presumption "in light of muddled state of law" and finding no prejudice in that case); Baynes v. AT&T Technologies, Inc., 982 F.2d 295 (8th Cir. 1992) (CRA; recognizes conflict, chooses Bradley, substantive rights weigh against

retroactivity); Federal Deposit Insurance Corp. v. Wright, 942 F.2d 1089 (7th Cir. 1991), cert. denied, 112 S.Ct. 1937 (1992) (FIRREA; recognizes conflict, applies Bradley on basis not retroactive if threaten manifest injustice by disrupting vested rights); DeGurules v. Immigration and Naturalization Service, 833 F.2d 861 (9th Cir. 1987) (Immigration Reform and Control Act; follows Bradley without reference to conflict); Winston v. Maine Technical College System, 631 A.2d 70 (Me. 1993) (Federal Rehabilitation Act of 1973 Amendment of 1992; follows Bradley without reference to conflict).

In the following cases the courts recognized the conflict and recognized two presumptions on the basis of substantive versus procedural rights. Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992)

(CRA; Bradley should not be applied when substantive rights involved); Demars v. First Service Bank for Savings, 907 F.2d 1237 (1st Cir. 1990) (FIRREA); U.S. Supreme Court decisions established two presumptions, prospective for substantive rights and liabilities, retroactive for others).

In other cases the courts recognized the conflict but found it unnecessary to choose since either would produce the same results in those cases. For example, United States v. Alcan Aluminum Corp., 990 F.2d 711 (2nd Cir. 1993) (Superfund Amendments and Reauthorization Act of 1986; prefers strong presumption against retroactivity but same result with either in this case); Gersman v. Group Health Ass'n, Inc., 975 F.2d 886 (D.C. Cir. 1992) (CRA; favors Bowen but same result with

either in this case.)

In one case the court recognized the conflict and found it necessary to distinguish on the basis of cases on appeal versus cases yet to be decided, Bradley to be applied in the former and Bowen in the latter. Butts v. City of New York Dept. of Housing, Preservation and Development, 990 F.2d 1397 (2nd Cir. 1993) (CRA; expresses belief "notwithstanding Bradley", should never be a presumption of retroactivity).

(Federal Deposit Insurance Corp. v. Wright, supra, suggests there is less conflict than appears between Bradley and Bowen. Basically, the court there says the result should be the same under either presumption. Bradley "manifest injustice" would preclude any retroactive disruption of vested rights as would Bowen.)

In Demars v. First Service Bank for Savings, supra, the First Circuit Court of Appeals, the Circuit responsible for the State of Maine, recognized the U.S. Supreme Court's decisions as establishing two presumptions, one by Bradley and one by Bennett. Id. at 1239-40. The Bennett presumption of prospective effect applies to statutes affecting substantive rights and liabilities. But in the present case the Maine Supreme Judicial Court simply chose to follow Bradley without distinction, in determining to apply section 706(8)(F) retroactively to the petitioner's pending case. In so doing, it drastically impacted the petitioner's substantive rights. It is evident that section 706(8)(F) affects substantive rights. It makes the difference between a person with the petitioner's condition

being protected under the Rehabilitation Act or not. It "interferes with antecedent rights" and is a provision by which human action [respondents' obligations with respect to one with the petitioner's condition] is regulated". Demars, supra, at 1240, citing Union Pacific R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913). Unlike the dissenters' argument in Kaiser Aluminum, here the amendment clearly does "eliminate a substantive defense in a way that would cause hardship to [the petitioner]." Kaiser Aluminum, supra, at 1594 (dissenting opinion).

A Tenth Circuit case, DeVargas, supra, like the current case, dealt with an amendment to section 504 of the Federal Rehabilitation Act. The Amendment was the Civil Rights Restoration Act of 1987, passed by Congress to overturn this Court's

decision in Grove City College v. Bell, 465 U.S. 555 (1984), making section 504 program specific in its application of its prohibitions on disability discrimination to programs and activities receiving federal financial assistance. Unlike the Maine Supreme Judicial Court in the present case, the Tenth Circuit in DeVargas chose the opposite presumption against retroactivity of Bowen and came out with the opposite result. The Court noted that retroactive application there would, as it does in the present case, affect substantial rights and therefore had to be presumed to be prospective only. DeVargas and the current case are clearly in conflict over substantive amendments and their applicability to section 504 of the Rehabilitation Act.

Thus the First Circuit, the Circuit responsible for the State of Maine, and the Maine Supreme Judicial Court are in conflict on this issue and, unless this Court resolves the issue, will continue to apply federal law differently. That conflict is but part of a larger conflict among the Circuits, most of which have identified this Court's decisions in Bradley and Bowen to be confusing and in conflict. It has resulted in a direct conflict in the present case with respect to substantive amendments to section 504 of the Federal Rehabilitation Act. As the petitioners in Rivers v. Roadway Express Inc., supra, have cited, the district courts are in confusion. One such district court's complaint was stated as follows:

> "Considering all the ink that has been spilled and all the judicial resources that have been consumed over this issue in district and circuit court cases around the

> country, the actions of Congress in intentionally ducking the retroactivity issue in the 1991 legislation and of the United States Supreme Court in deliberately failing to resolve its conflicting precedents on retroactivity principles appear to be textbook examples of unnecessary costs and delay in civil litigation...."

Letourneau v. Casa Mia, Inc., 804 F.Supp. 389, 393 (D.Me. 1992). Certiorari should be granted to resolve the conflict in these cases and to provide guidance to the lower courts in applying Bradley and Bowen.

II. THE MAINE SUPREME JUDICIAL COURT MISAPPLIED THE "MANIFEST INJUSTICE" TEST SET FORTH IN BRADLEY V. SCHOOL BOARD OF RICHMOND, 416 U.S. 696 (1974), IN DETERMINING THAT THE APPLICATION OF 29 U.S.C. SECTION 706(8)(F) WOULD NOT RESULT IN MANIFEST INJUSTICE TO THE PETITIONER.

The Bradley standard should properly preclude retroactive application of Section 706(8)(F) in this case because such application would result in manifest

injustice to the petitioner. The Maine Supreme Judicial Court found otherwise. Winston v. Maine Technical College System, 631 A.2d 70, 74, n.7 (1993). Bradley established a 3-part test to determine whether manifest injustice would result from retroactive application. This test requires examining "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in the law upon those rights." Bradley, supra, at 717.

(a) **The Nature and Identity of the Parties.**

The first test under Bradley is the nature and identity of the parties. The First Circuit, in an age discrimination case, distinguished between private parties and public parties and found that greater protection against retroactivity should

ordinarily be afforded a private party. Aledo-Garcia v. Puerto Rico National Guard Fund, Inc., 887 F.2d 354 (1st Cir. 1989). "If the party against whom the statute is to be applied is a public party, then the 'struggle' against the so-called retroactive application is not as hard." Id. at 356.

In the present case the petitioner is a private party and the respondents are public parties. The Amendment in question here, applied retroactively, affects rights personal to the petitioner. Thus Bradley's first prong favors prospective application of section 706(8)(F).

(b). The Nature of the Parties' Rights.

Bradley next requires the examination of the nature of the parties' rights. Aledo-Garcia involved the right of an

employer to fire an employee solely because of his age and the right of an employee to continued employment in the absence of any non-discriminatory factors that might legitimately support a decision to terminate his services. Aledo-Garcia, 887 F.2d at 357. There the court came down on the side of the employee's right to continued employment free from discrimination.

At issue in this case is the right of an employer to fire an employee solely because of a disability and the right of an employee to continued employment in the absence of any non-discriminatory factors that might legitimately support a decision to terminate his services. Congress recognized that the sexual disorders affected by Section 706(8)(F) are physical or mental impairments although it excluded

them from protection. 1990 U.S. Code Cong. & Admin. News, p. 499 (referring to the legislative history of the Americans with Disabilities Act of 1990 from which Section 706(8)(F) was later taken, 42 U.S.C. § 12211(b)(1) [Pamph. 1993]). It is not unfair to subject the respondents here to liability for violating a statutorily mandated standard of conduct in effect at the time of the respondent's conduct. The prospective application only of Section 706(8)(F) would impose no unanticipated obligations on the respondents. On the other hand, the petitioner would lose the right to his job, indeed his career, for reasons that had nothing to do with job performance. Thus the nature of the rights of the parties also points to prospective application of Section 706(8)(F).

(c) **The Nature of the Impact of the Change in the Law Upon the Rights of the Parties.**

The third Bradley test is the scrutiny of the impact upon the rights and obligations of the parties. Aledo-Garcia states that this inquiry "stems from the concern regarding the application of new and unanticipated obligations upon a party." Aledo-Garcia, supra, at 357. The First Circuit there considered a balancing test which it later laid out in Demars, supra, to determine whether retroactivity would result in manifest injustice under this prong.

In this case the disappointment of the expectations of the petitioner far outweighs any impact of the change on the respondents. The petitioner could have rightly expected at the time of the

exposure of his disability that he would have been protected from loss of his employment absent sufficient non-discriminatory cause for the respondents to terminate him. Of the highest significance here is the self-disclosure by the petitioner to the respondents of his impairment. With knowledge that his disability would likely be cause for his termination, it is unlikely that he would have been so quick to make self-disclosure to the college administration.

The impact upon the private expectations of the petitioner here is clear. As the law existed at the time his problems exhibited themselves, he could rightly have expected, and in fact requested, an individualized assessment of his disability and a fair determination as to whether he was able to perform his job

despite his disability with or without reasonable accommodation. Instead he was terminated without such individualized assessment which under the law existing at that time was required under Section 504 of Federal Rehabilitation Act. School Board of Nassau County v. Arline, 480 U.S. 273, 287 (1987). At the time of his termination the respondents' actions violated the law and the petitioner's rights. By the retroactive application of Section 706(8)(F) the petitioner lost substantial rights in his employment and career and the respondents gained condonation of their previously illegal conduct. By prospective application only the petitioner will be provided only the legitimate expectations he could have had at the time of the disclosure of his disability and the respondents will neither have lost any

legitimate expectations they could rightfully have had at the time of their termination of the petitioner nor have imposed on them any new or legitimately unanticipated obligations. Accordingly, the nature of the impact of the change in the law upon the rights of the parties clearly favors prospective application only of Section 706(8)(F).

Applying the 3-part test of Bradley, then, necessarily results in the conclusion that manifest injustice would result to the petitioner from a retroactive application of Section 706(8)(F) and no manifest injustice to the respondents would result from prospective application only of the statute. This result is furthered by the principle stated in Federal Deposit Insurance Corp. v. Wright, supra, that "manifest injustice" precludes retroactive

disruption of vested rights. Any other result in this case would bear out the danger cited by the concurring opinion in Kaiser Aluminum that "manifest injustice" will turn out to be "just a surrogate for policy preferences". Kaiser Aluminum, supra., at 1587. Certiorari should be granted to review the decision of the court below because it did not properly apply the Bradley test in this case.

CONCLUSION

For the reasons cited above, a writ of certiorari should issue to review the judgment and opinion of the Maine Supreme Judicial Court.

December 23, 1993

Respectfully submitted,

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APPENDIX A

OPINION OF
THE MAINE SUPREME
JUDICIAL COURT

DECIDED SEPTEMBER 1, 1993

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 6638
Law Docket No. AND-92-517

DONALD C. WINSTON

V.

MAINE TECHNICAL COLLEGE SYSTEM, et al.

Argued May 10, 1993
Decided September 1, 1993

Before WATHEN, C.J., and ROBERTS, GLASSMAN, CLIFFORD, COLLINS, RUDMAN, and DANA, JJ.

WATHEN, C.J.

We are called on to decide whether a person who is diagnosed as being subject to compulsive sexual behavior may be considered as mentally disabled for purposes of the antidiscrimination provisions with respect to employment within the purview of the Federal Rehabilitation Act of 1973 or the Maine Human Rights Act. Plaintiff Donald C. Winston appeals from an order of the

Superior Court (Androscoggin County, Alexander, J.) granting summary judgment in favor of defendants Maine Technical College System (MTCS), Central Maine Technical College (CMTC), and Richard Conrath.[1] He contends that genuine issues of material fact remain and that defendants are not entitled to a judgment on his claim that the termination of his employment constitutes unlawful discrimination on the basis of his mental handicap of compulsive sexual addiction in violation of section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794 (Pamph. 1993), the Maine Human Rights Act, 5 M.R.S.A. §§ 4551 - 4632 (1989 & Supp. 1992), and the First and Fourteenth Amendments to the United States Constitution as enforced by 42 U.S.C.A. §

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[1]Conrath was the Director of Central Maine Vocational Technical Institute, now CMTC, during the 1988-1989 school year.

1983 (1981). The applicable law in effect at the time the Superior Court rendered its decision excluded sexual behavior disorders from the definition of a disabled individual. We, therefore, affirm the judgment.

The factual assertions viewed in the light most favorable to plaintiff may be summarized as follows: Plaintiff taught in the MTCS for nineteen years. He was a tenured English instructor at CMTC in 1989 when he was terminated for violating the school's sexual harassment policy by kissing one of his eighteen-year-old female students after a sexually suggestive conversation. Plaintiff asserts that the kiss was consensual, but he acknowledges that the kiss was inappropriate and he immediately apologized to the student several times. He then met with Conrath,

disclosing that he was "sexually obsessive" and that he had had some involvement with a student, but that he had taken care of it. Twenty days later the student told Conrath that plaintiff had sexually harassed her. The charges were investigated. During this period Conrath made numerous references to his concern for plaintiff's mental health and commented that he thought plaintiff was "deeply troubled psychologically."[2] Plaintiff was subsequently discharged. Although the

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[2]CMTC was aware that plaintiff had been experiencing a great deal of stress in the years preceding the incident that led to his termination. Plaintiff was granted an emergency leave in March, 1987 because of personal stress. In the spring of 1987 he had a breakdown in a meeting with the school's assistant director. He began seeking out prostitutes in the summer of 1988, and disclosed his concern over this behavior to his Department Chair. These facts and Conrath's remarks are the basis of plaintiff's claim that he was terminated because of his asserted disability.

termination letter refers only to the single incident of inappropriate behavior with a student, defendants were aware of four prior instances of sexual behavior with students.[3]

After his termination, plaintiff filed a grievance under the collective bargaining agreement of his union, the Maine State Teachers' Association. The union subsequently filed for arbitration under the agreement. After eleven days of hearings the arbitrator denied the

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[3]In 1983 or 1984 a female student filed a claim of sexual harassment against plaintiff, but the school never informed him of the charge and he denies any misconduct. While an instructor at Northern Maine Technical College, plaintiff admits to having consensual sexual relationships with two adult students, one of whom was never enrolled in his class. The fourth incident occurred in the fall of 1988 when he made a date with one of his students and then kissed her. The next day plaintiff broke the date. Only the 1983 incident resulted in a complaint.

grievance, finding that CMTC and MTCS did not violate the collective bargaining agreement in discharging plaintiff.[4] The union declined plaintiff's request to appeal the arbitrator's decision.

Plaintiff subsequently filed this lawsuit, claiming that he was terminated because of his "mental handicap of sexual addiction." The record contains evaluations of plaintiff's condition by three mental health professionals, two of whom diagnosed plaintiff's sexual addiction as Impulse Control Disorder Not Otherwise Specified, or DSM-III-R, based on the Diagnostic and Statistical Manual of Mental Disorders (3d ed. rev. 1987). Both experts stated that the disorder led to plaintiff's

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[4]The agreement provides that termination may be only for just cause and establishes a policy against all forms of illegal discrimination.

termination, that the addiction is a permanent condition, that it was therefore unlikely that plaintiff would be hired in another teaching position, and that plaintiff is currently capable of performing his job as a teacher, including contact with students, without accommodation. The third expert testified that he does not believe that DSM-III-R is intended to be applied to sexual behavior, but even if it were, plaintiff would not meet the requisite criteria because plaintiff's behavior was controllable rather than compulsive.

The Superior Court granted a summary judgment in favor of defendants on all claims, ruling as a matter of law that plaintiff's claimed disability of impulse control disorder does not qualify him for protection under applicable laws protecting

persons with disabilities from employment discrimination.

As a preliminary matter, we reject defendants' argument that the arbitrator's decision precludes the assertion of plaintiff's claim under anti-discrimination statutes and establishes conclusively that harassment occurred. Defendants cite Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991) for the proposition that employment discrimination claims may be the subject of binding arbitration when an employee agrees to arbitrate statutory claims.[5] By merely joining a union,

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[5]We conclude that the instant situation fits within the rule set out in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981), and McDonald v. City of West Branch, 466 U.S. 284 (1984), that the arbitration of contract-based claims pursuant to a collective bargaining agreement does not preclude subsequent judicial resolution of statutory claims. This is true even when, as here, the claim was before the arbitrator and the

however, without specifically contracting to arbitrate statutory employment discrimination claims, an employee is not precluded from asserting such claims in litigation.

Our analysis begins with section 504 of the Rehabilitation Act of 1973 (Act) that provides that: "[n]o otherwise qualified individual with a disability ... shall, solely by reason of his or her disability, be ... subjected to discrimination under any program or activity receiving Federal financial assistance." 28 U.S.C.A. §794. A disabled individual is defined as one who: "(i) has a physical or mental impairment which

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collective bargaining agreement prohibits the type of discrimination alleged in the suit claiming a violation of statutory rights. See id. at 289. The vitality of Alexander and its progeny was reaffirmed by the Supreme Court in Gilmer, 111 S. Ct. at 1656-57.

substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." Id. § 706(8)(B). The Department of Health, Education and Welfare promulgated regulations offering guidance on the scope of section 504. Those regulations provide that "mental impairment" is "any mental or psychological disorder, such as ... emotional or mental illness," 45 C.F.R. § 84.3(j)(2)(i)(B) (1992), and define "major life activities" to include working. Id. § 84.3(j)(2)(ii). The appendix to the regulations indicates that the Act should not be limited to traditional handicaps. 45 C.F.R. pt. 84, app. A at 377 (1992).

Although not raised by the parties, we note that, effective October 29, 1992, the Act was amended to provide that the term

"individual with a disability" does not include an individual on the basis of certain conditions, including sexual behavior disorders. Pub. L. 102-569, § 102, 106 Stat. 4349 (1992) (codified at 29 U.S.C.A. § 706(8)(F) (Pamph. 1993).[6] Plaintiff's claimed addiction is a sexual behavior disorder. Because the Superior Court ruled on plaintiff's discrimination claim after the effective date of the

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[6]U.S.C.A. § 706(8)(F) provides in its entirety as follows:

> (F) For the purposes of sections 791, 793, and 794 of this title, the term "individual with a disability" does not include an individual on the basis of -
>
> (i) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
>
> (ii) compulsive gambling, kleptomania, or pyromania; or
>
> (iii) psychoactive substance use disorders resulting from current illegal use of drugs.

amendment, the court properly could have relied on the amendment to conclude that plaintiff had no claim under the Act as a matter of law. In Bradley v. School Board of City of Richmond, 416 U.S. 696, 711 (1974), the United States Supreme Court held that "a court is to apply the law in effect at the time it renders its decision...." This establishes a presumption that a new statute should be applied retroactively even if it "does not explicitly recite that it is to be applied to pending cases," and rejects the proposition that "a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature." Id. at 715. Here, there is no clear evidence of a congressional intent for or against the retroactive application of section

706(8)(F). Therefore, we find that the amendment could have been relied on by the Superior Court to support its ruling.[7]

We next address whether a sexual impulse control disorder can constitute a legal disability under the Maine Human Rights Act (MHRA), 5 M.R.S.A. §§ 4551-4632. The provisions of the MHRA regarding mental disability are very similar to those contained in the Act. The MHRA prohibits the discharge of an employee because of a mental disability, except when based on a bona fide occupational qualification. Id. § 4572(1)(A) (Supp. 1992). The MHRA

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[7]We note that the presumption established in Bradley that a court apply the law in effect at the time it renders its decision may be defeated when there is clear congressional intent to the contrary or when its application would result in "manifest injustice" to a party. Bradley v. School Board of City of Richmond, 416 U.S. at 711. Neither of those exceptions applies here.

defines "mental disability" as "any disability ... or mental condition caused by ... illness, and includes the ... mental condition of a person that constitutes a substantial disability as determined ... by a psychiatrist or psychologist ..." Id. § 4553(7-A) (Supp. 1992). The Maine Human Rights Commission has supplemented the statutory definition by regulation as follows: "1. An applicant or employee who has a 'physical or mental handicap' means any person who has a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such impairment, or is regarded as having such an impairment." Me. Human Rights Comm'n, Employment Reg. § 3.02(C)(1). The

regulations also provide that the term 'mental impairment' includes emotional illness, that 'major life activities' includes working, and that one is 'regarded as having an impairment' if the employer treats him as having an impairment and as being substantially limited by it. Id. § 3.02(C)(2). Finally, the regulations state that "the remedial provisions of the [MHRA] shall be given broad construction and its exceptions shall be construed narrowly." Id. § 3.01(C)(1). There is no explicit exclusion of sexual behavior disorders from the definition of a disabled individual.

We have stated that because the MHRA generally tracks federal anti-discrimination statutes, it is appropriate to look to federal precedent for guidance in interpreting the MHRA. Maine Human Rights Comm'n v. City of Auburn, 408 A.2d

1253, 1261 (Me. 1979). Unfortunately, a review of federal case law concerning conditions that constitute a disability provides minimal guidance in determining when it is appropriate to impose categorical limits on the definition of a disabled individual. Section 706(8)(F), however, clarifies the original intent of Congress as to the parameters of the definition of a disabled individual under federal law. Because the MHRA was modeled after the Act, and the Act was not intended to protect individuals with sexual behavior disorders, we conclude that plaintiff's condition is not protected under the MHRA as a matter of law. We further note that the DSM-III-R label has not been officially identified to include sexual addiction, that defendant's psychiatrist's opinion is based on a very broad "process" addiction

model representing the view of a "subset" of physicians, and that the Americans with Disabilities Act of 1990 (ADA) also specifically excludes "sexual behavior disorders" from the term "disability," 42 U.S.C.A. § 1221(b)(1) (Pamph. 1993).

Plaintiff next argues that he has a cognizable claim pursuant to 42 U.S.C. § 1983. Defendants counter that this claim must fail because neither MTCS nor CMTC are "persons" subject to suit under 42 U.S.C. § 1983.[8] In Will v. Michigan Dept of State

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[8]Section 1983 reads in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State...subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Police, 491 U.S. 58 (1989), the Supreme Court held that neither a state, state agency, nor state official sued in an official capacity is a "person" subject to suit pursuant to § 1983. Therefore, if the state is the real party in interest, the action is not being maintained against a "person" subject to suit within the meaning of § 1983.

In determining whether the state is the real party in interest we look to (1) the relationship between the state and the defendant to determine if the defendant is an alter ego of the state or if it is relatively autonomous; and (2) whether funds to pay a judgment would come from the state treasury. See 1 Joseph G. Cook & John L. Sobieski, Jr., Civil Rights Action § 2.01(D), at 2-60.11, 2-60.14 (1990) [hereinafter Cook & Sobieski].

With regard to the first issue, the evidence demonstrates that MTCS and CMTC have an intimate relationship with the state and can reasonably be regarded as an alter ego of the state. The MTCS is created by Title 20-A M.R.S.A. § 12702(1993) which provides as follows:

> There is established the Maine Technical College System which shall be a body corporate and politic and a public instrumentality of the State and the exercise of the powers conferred by this chapter shall be deemed and held to be the performance of essential governmental functions. The system shall consist of the board of trustees, the Technical College Support Office and the technical colleges.

Members of the Board of Trustees are appointed by the Governor for four year terms and must be confirmed by the Legislature. Id. § 12705(2). The Commissioners of Education, Economic and Community Development, and Labor serve ex

officio. Id. § 12705(1). The Governor and Legislature approve the system's budget prepared by the Board of Trustees which is "used in support of any requests to the legislature for General Fund appropriations" needed to supplement other resources available to the system, and which is the basis of the system's fiscal management plan. Id. §§ 12706(4)-(4-A). The Maine Technical College System is also defined as part of the "State" for purposes of the Maine Tort Claims Act. 14 M.R.S.A. § 8102(4) (Supp. 1992). Although the System has the power to own and transfer real estate, any such transfers are subject to the approval of the Legislature. 20-A M.R.S.A. § 12706(13).

Plaintiff cites statutory provisions granting the MTCS the right to sue and be sued in its own name, id. § 12706(10),

delegating extensive powers to the board of trustees, id. § 12706, and giving the MTCS the right to own and transfer real property, in support of his contention that the defendants are relatively autonomous from the state. Although the MTCS has considerable autonomy in regard to its daily operations, the critical functions of budgeting and funding remain subject to state control, and therefore defendants can reasonably be characterized as alter egos of the state.

Plaintiff also asserts that because the MTCS has exclusive control over certain funds not received from the state, such as tuition payments and endowments, any judgment could be paid from these funds and the state treasury would not be implicated. We disagree. First, because almost all state agencies have access to non-state

funds, this factor cannot be the determining one. Second, as a practical matter, even if a judgment were not paid directly with state funds, state appropriated funds would have to be used to replenish the funds expended.

Because payment of a judgment would interfere with the state's fiscal autonomy, and the MTCS is highly dependant on the state, we conclude that the state is a real party in interest.[9] Therefore, neither CMTC, MTCS, nor Conrath are "persons" within the meaning of § 1983 and the judgment was proper as to these claims.

Plaintiff finally argues that the complaint states a claim against Conrath

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[9]We note that the majority of courts that have considered the issue have also concluded that the state is a real party in interest in actions initiated against state universities and colleges. See Cook & Sobieski, § 2.01(D) at 2-60.23 - 2-60.27.

individually pursuant to § 1983. We disagree. Contrary to plaintiff's contention, Conrath is shielded by qualified immunity from personal liability for his discretionary acts, including the termination of plaintiff's employment. See Anderson v. Creighton, 483 U.S. 635, 638 (1987) (Generally, government officials performing discretionary functions have qualified immunity "shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with rights they are alleged to have violated"). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). That is not the case here.

The entry is:

Judgment affirmed.

All concurring.

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APPENDIX B

MANDATE
OF
THE SUPREME JUDICIAL COURT

SEPTEMBER 1, 1993

STATE OF MAINE

SUPREME JUDICIAL COURT

LAW COURT DOCKET NO. AND-92-517

DONALD WINSTON

V.

MANDATE

MAINE TECHNICAL COLLEGE SYSTEM, et al.

The above-captioned cause having been brought before this Court, sitting as the Law Court, from the Superior Court in the County of Androscoggin; and it having been heard and maturely considered;

IT IS ORDERED that the Clerk of the Law Court enter upon the Law Court Docket and certify to the Clerk of the Superior Court in Androscoggin County, the following mandate therein:

Judgment affirmed.

Dated: September 1, 1993

For the Court,

DANIEL E. WATHEN
Chief Justice

APPENDIX C

MOTION FOR RECONSIDERATION

SEPTEMBER 14, 1993

MAINE SUPREME JUDICIAL COURT
SETTING AS THE LAW COURT
Law Docket No. AND-92-517

DONALD C. WINSTON, Appellant	)	
v.	)	MOTION FOR RECONSIDER-ATION
MAINE TECHNICAL COLLEGE SYSTEM, et al. Appellees	)	

NOW COMES Plaintiff/Appellant, Donald C. Winston, and moves the Court for reconsideration of its decision of September 1, 1993 and to reverse the decision or to restore the case to the calendar for reargument or resubmission.

The reasons for this motion are set forth in the accompanying Memorandum.

Dated: September 14, 1993

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APPENDIX D

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

SEPTEMBER 14, 1993

MAINE SUPREME JUDICIAL COURT
SETTING AS THE LAW COURT
Law Docket No. AND-92-517

DONALD C. WINSTON, Appellant	)	
v.	)	MEMORANDUM IN SUPPORT OF MOTION FOR RECON-SIDERATION
MAINE TECHNICAL COLLEGE SYSTEM, et al. Appellees	)	

On September 1, 1993, this Court determined that Plaintiff's condition was not protected under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. Section 794 (Pamph. 1993), and the Maine Human Rights Act, M.R.S.A. Sections 4551-4632. The ruling under the Rehabilitation Act was based upon an amendment to that Act, 29 U.S.C.A. Section 706(8)(F), excluding sexual behavior disorders from the definition of disability. The ruling under the MHRA piggybacked upon the Rehabilitation Act

ruling, noting that the MHRA generally tracks federal anti-discrimination statutes and then stating that section 706(8)(F) "clarifies the original intent of Congress as to the parameters of the definition of a disabled individual under federal law."

The Court concluded:

> "Because the MHRA was modeled after the [Rehabilitation] Act, and the Act was not intended to protect individuals with sexual behavioral disorders, we conclude that plaintiff's condition is not protected under the MHRA as a matter of law."

Now the Plaintiff moves the Court to reconsider its decision under M.R. Civ. P. 76A(b) which provides for reconsideration on the basis of the overlooking or misapprehension by the Court of law or fact. Plaintiff respectfully proposes that in this case the Court has indeed overlooked or misapprehended the law. Furthermore, as the Court explicitly

stated, the issue of the amendment to the Rehabilitation Act and its effect on this case was not raised by the parties either before the Superior Court nor this Court, the Superior Court makes no reference to it, and therefore the issue has never been briefed or argued by the parties.

ARGUMENT

I. 29 U.S.C.A. Section 706(8)(F) amending Section 504 of the Federal Rehabilitation Act Amended Substantive Rights of the Parties and therefore must be applied prospectively only.

This Court, in applying section 706(8)(F) retroactively here, relies upon Bradley v. School Board of City of Richmond, 416 U.S. 696, 711 (1974), where the United States Supreme Court stated that "a court is to apply the law in effect at the time it renders its decision...." It stated that to be the rule "unless doing so would result in manifest injustice

or there is a statutory direction or legislative history to the contrary." Id. This Court stated that "this establishes a presumption that a new statute should be applied retroactively." This Court further stated that there is no clear evidence of a congressional intent for or against the retroactive application of section 706(8)(F). Thus it was held in effect that it should be applied retroactively here on the basis of the presumption. (Here the discriminatory conduct took place in 1989, the oral argument before the Superior Court took place October 27, 1992, section 706(8)(F) was effective October 29, 1992, and the Superior Court decision is dated November 2, 1992.) However, neither this Court nor the Court below addressed the more recent cases which create a different presumption where the

statutory amendments are substantive in nature. Bennett v. New Jersey, 470 U.S. 632 (1985); Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988); Demars v. First Service Bank for Savings, 907 F.2d 1237 (1st Cir. 1990); Duplessis v. Training and Development Corp., U.S. District Court, District of Maine, Civil No. 92-0096-B (May 14, 1993) (Brody, J.) (copy attached). Cf. Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 836-37 (1990).

In 1985, in Bennett v. New Jersey, 470 U.S. 632 (1985), the U. S. Supreme Court rejected the Bradley presumption where substantive rights were affected. The Court stated:

> "We conclude, however, that reliance on such a presumption in this context is inappropriate. Both the nature of the obligation that arose under the Title I program and Bradley itself suggest that changes in

> substantive requirements for federal grants should not be presumed to operate retroactively."

Id. at 638. The Court stated further:

> "Bradley held that a statutory provision for attorney's fees applied retroactively to a fee request that was pending when the statute was enacted. This holding rested on the general principle that a court must apply the law in effect at the time of its decision, see United States v. Schooner Peggy, 1 Cranch 103 (1801), which Bradley concluded holds true even if the intervening law does not expressly state that it applies to pending cases. 416 U.S., at 715. Bradley, however, expressly acknowledged limits to this principle. 'The Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional.' Id., at 720. This limitation comports with another venerable rule of statutory interpretation, i.e., that statutes affecting substantive rights and liabilities are presumed to have only prospective effect. See, e.g., United States v. Security Industrial Bank, 459 U.S. 70, 79 (1982); Greene v. United States,

> 376 U.S. 149, 160 (1964). Cf. Bradley, supra, at 721 (noting that statutory change did not affect substantive obligations).

Id. at 639-40. (emphases added)

Subsequently in Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988), the U.S. Supreme Court again stated:

> "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. e.g., Greene v. United States, 376 U.S. 149, 160 (1964); Claridge Apartments Co. v. Commissioner, 323 U.S. 141, 164 (1944); Miller v. United States, 294 U.S. 435, 439 (1935); United States v. Magnolia Petroleum Co., 276 U.S. 160- 162-163 (1928).

In Demars v. First Service Bank for Savings, supra, the First Circuit Court of Appeals (Campbell, J., Coffin, J., Cyr, J.) recognized the U.S. Supreme Court's decisions as establishing two presumptions, one by Bradley and one by

Bennett. Id. at 1239-40. The Bennett presumption of prospective effect applies to statutes affecting substantive rights and liabilities, which the First Circuit applied in Dion v. Secretary of Health and Human Services, 823 F.2d 669 (1st Cir. 1987). See also McAndrews v. Fleet Bank of Massachusetts, N.A., 989 F.2d 13 (1st Cir. 1993); Duplessis v. Training and Development Corp., supra (attached hereto) ("Bennett rule of prospectivity would apply if substantive rules of conduct were affected; otherwise Bradley would apply." at 4.).

Some gloss on these principles is added by Davila v. New York Hospital, 813 F. Supp. 977 (S.D.N.Y., 1993) where, because of the inherent unfairness of applying a statutory change retroactively, the court recognized the necessity of a

more stringent analysis when determining whether a statutory change impacts on substantive rights than when determining whether a rule is substantive or procedural for purposes of deciding whether federal or state law applies.

Plaintiff submits that is clearly evident here that section 706(8)(F) affects substantive rights and rules of conduct. It makes the difference between a person with plaintiff's condition being protected under the Rehabilitation Act and the MHRA or not. It 'interferes with antecedent rights" and is a provision by which human action [Defendants' obligations with respect to one with Plaintiff's condition] is regulated. Demars, supra, at 1240. It clearly "change[s] the standard for evaluating the legality of conduct...." Duplessis, supra, at 5-6.

Accordingly, plaintiff submits it was error for the Court to apply section 706(8)(F) to this case where the discriminatory conduct took place long before the effective date of that section and the action was pending prior to the effective date.

The foregoing conclusion is reinforced in this case because the Bradley standard also should properly preclude retroactive application because such application would result in manifest injustice. This Court found otherwise, page 7, n. 7, but provided no analysis. In Bradley the Court established a 3-part test to determine whether manifest injustice would result from retroactive application. The test requires examining "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the

impact of the change in the law upon those rights." Bradley, supra, at 717; Duplessis v. Training & Development Corp., supra, at 3-4.

Analysis under this 3-part test was provided by the First Circuit Court of Appeals in an age discrimination case, Aledo- Garcia v. Puerto Rico National Guard Fund, Inc., 887 F.2d 354 (1st Cir. 1989). See also, Duplessis, supra, at 6-12. Under the first prong of the test the First Circuit found that greater protection against retroactivity should ordinarily be afforded a private party. Aledo-Garcia, supra, at 356. In analyzing the second prong the court contrasted the public employer's right to fire the employee because of his age versus the right of the employee to continued employment without such discrimination.

Id. at 357. For the third prong the court considered the application of any new and unanticipated obligations. In the present case the retroactive application would work against the private party, the plaintiff. It involves the right of the plaintiff to employment free of disability discrimination (Congress recognized that the sexual disorders are physical or mental impairments. 1990 U.S. Code Cong. & Admin. News, p. 499 (referring to legislative history of Americans with Disabilities Act from which section 706(8)(F) was later taken) versus the defendants' right to fire him because of his disability. The prospective application only would impose no new or unanticipated obligations on defendants. Thus, as in Aledo-Garcia, the balance swings in favor of plaintiff against

retroactivity. Id. at 357.

II. The Maine Human Rights Act cannot be interpreted to have intended the exclusion of sexual behavior disorders on the basis of section 706(8)(F).

The foregoing discussion also precludes the interpretation of the MHRA to be retroactively affected by section 706(8)(F). Since the MHRA is interpreted to track the federal antidiscrimination statutes and the Federal Rehabilitation Act cannot by retroactive application of section 706(8)(F) be deemed to have excluded plaintiff's condition from protection, consistent interpretation of the MHRA requires the same result.

This is also evident from the law pertaining to determining whether or not an amendatory statute effects a change in the law or merely clarifies the original legislative intent. This Court states

that 706(8)(F) clarifies the original intent of Congress. But the case law establishes a presumption that a statutory amendment is intended to change the law. McCammon v. Indiana Dept. of Financial Institutions, 973 F.2d 1348 (7th Cir. 1992) (Indiana law); United States v. Canadian Vinyl Industries, Inc., 555 F.2d 806 (Cust. & Pat. App. 1977); In re Bennett, 338 F.2d 479 (6th Cir. 1964); Lake Union Drydock Co. v. M/V Polar Viking, 446 F. Supp. 1286 (D.C. Wash. 1978); Kaup v. Western Cas. & Sur. Co., 432 F. Supp. 922 (D.C. Mont. 1977); Matheson v. City of Portland, 288 A.2d 476 (Me. 1972); In re Bangor & Aroostook Ry. Co., 188 A.2d 485 (Me. 1963); Van Nuis v. Los Angeles Soap Co., 36 Cal. App. 3d 222, 111 Cal. Rptr. 398 (C.A. 1973); 73 Am. Jur. 2d, Statutes, Section 236, p. 417; 82 C.J.S., Statutes,

Section 316, p. 545. See, Johnson v. United States, 255 U.S. 405, 415 (1912). Accordingly, the law on this point supports the position that the MHRA should not now be interpreted retroactively to have intended the exclusions of 706(8)(F).

CONCLUSION

The decision of the Court below was based upon an issue not raised or addressed by the parties. Neither was it raised or addressed before the court below.

It appears that the Court overlooked or misapprehended the federal law with respect to the retroactive application of a statutory amendment. This in turn apparently caused the Court to misapprehend the original intent of the Federal Rehabilitation Act and therefore the piggybacked intent of the Maine Human

Rights Act. (There can also be raised substantial question as to equal protection of the law by categorical exclusion of particular disabilities from coverage of the law.)

In the present case the discriminatory conduct occurred long before any statutory amendment which would exclude Plaintiff's condition from coverage of the Rehabilitation Act. It was even argued before the effective date of the Amendment. Misapplication of the law here would surely result in great injustice. Even under the standards of law applied, precedent points to manifest injustice.

Accordingly, Plaintiff requests that the Court reconsider its decision of September 1, 1993, and pursuant to M.R. Civ. P. 76A(b)(3) reverse the decision or restore it to the calendar for reargument

or resubmission.

Dated: September 14, 1993

Respectfully submitted,

John J. Finn
Attorney for
Plaintiff/Appellant

APPENDIX E

ORDER OF THE
SUPREME JUDICIAL COURT

SEPTEMBER 28, 1993

STATE OF MAINE
CUMBERLAND, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW
COURT
Law Docket
No. AND-02-517

DONALD C. WINSTON,

Plaintiff/Appellee

v.

ORDER

MAINE TECHNICAL COLLEGE,

Defendant/Appellant

Upon motion of appellant for reconsideration,

It is ORDERED that the motion be, and it hereby is, DENIED. The mandate shall issue forthwith.

Dated: September 28, 1993

For the Court,

_____

Chief Justice

APPENDIX F

OPINION AND ORDER
OF
THE SUPERIOR COURT OF
THE STATE OF MAINE

NOVEMBER 2, 1992

STATE OF MAINE
SUPERIOR COURT
ANDROSCOGGIN, SS.
CIVIL ACTION
DOCKET NO. CV-91-287

DONALD C. WINSTON, Plaintiff v. MAINE TECHNICAL COLLEGE SYSTEM, et al., Defendants	)	**OPINION AND ORDER**

This matter is before the court on the defendants' Motion for Summary Judgment in this action challenging plaintiff Donald Winston's termination from his position as an instructor at the Central Maine Vocational Technical Institute, now Central Maine Technical College. Defendants include the Maine Technical College System, Central Maine Technical College, and Richard C. Conrath, President of the school. Mr. Winston claims the defendants have discriminated against him because of

his "mental handicap of sexual addiction."

Mr. Winston was terminated for violating the school's policy against sexual harassment resulting from his dealings with a student, including a kissing incident, in early 1989. This incident was at least the third time that Mr. Winston had been involved in inappropriate or questionable activities with a female student which had come to the school's attention. In the fall of 1988, Mr. Winston had kissed another student and arranged, then later cancelled, a date with the student off school grounds. This incident was not subject to a student complaint. However, Mr. Winston had disclosed and acknowledged the inappropriateness of this incident to a fellow faculty member. After the 1988 incident, he had sought counseling

regarding sexual issues.

In 1985, a nursing student had alleged that she was sexually harassed by Mr. Winston, asserting that she believed that Mr. Winston had sought sexually related contact with her and implied that her favorable response to such initiatives might affect her grades. This incident also did not result in a formal complaint, but other faculty members learned of it at the time.

The facts underlining the 1989 incident which led to Mr. Winston's termination are not seriously in dispute. It follows the pattern of what appears in the record regarding the 1988 student kissing incident.

The complainant in the 1989 incident was a student in Mr. Winston's English class. Mr. Winston, who was approximately

30 years older than the student, had observed the student and viewed her as attractive. After a school promotional event at the Bangor Mall, Mr. Winston came to believe that the student might be receptive to his interest. This belief was not based on anything that the student had said. It derived from Mr. Winston's views of how the student had dressed, how she sat in a chair, and how she dealt with others.

Mr. Winston had meetings with this student to discuss English papers.[1] Mr. Winston then arranged a private meeting with the student, ostensibly to discuss a

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[1]It must be emphasized that such meetings can be expected as part of a normal and appropriate student faculty relationship. However, Mr. Winston apparently held such meetings with some students, including the complainant, at times and places that were more secluded than some other faculty members thought advisable, and had caused their comment to Mr. Winston.

"problem" regarding another student. There are inconsequential differences as to what was actually said at this meeting in a conference room. However, based on either version, Mr. Winston's attraction to the student was discussed. There is no dispute that they then proceeded to an empty classroom, that Mr. Winston kissed the student and that she left the classroom immediately thereafter. Mr. Winston claims that this event was entirely consensual, the student asserts that it was not. However, there is no dispute that, just as with the 1988 kissing incident, Mr. Winston acknowledged its inappropriateness in relationship to a student. There is also no dispute, from independent observations of fellow students and faculty members, that the student evidenced significant emotional distress, initially for

undisclosed reasons, following the incident and prior to her disclosure of the sexual harassment event to school officials. After the kissing incident, the student felt there was further invitation to a possible relationship at private meetings arranged by Mr. Winston to discuss her school work.

Following disclosure and through investigation of the incident and determination by the school that Mr. Winston had violated its policies against sexual harassment, Mr. Winston was fired by the school. Mr. Winston's union, the Maine Teachers Association, then initiated grievance procedures in accordance with the collective bargaining agreement and arranged for counsel for Mr. Winston. The matter was referred to arbitration.

The arbitrator met with the parties and then conducted 11 days of hearings in 1990 leading to issuance of a 157-page arbitration opinion and award. It is difficult to understand what, in the context of this case, took 11 days to hear and 157-pages to decide. It is perhaps an example of due process run a muck in employee termination proceedings. The essential issues in such a proceeding would be whether the incident which led to the discipline occurred and whether the imposed discipline -- here termination -- was appropriate. Mr. Winston admits that the 1989 kissing incident occurred, and he acknowledges that it was inappropriate in the circumstances. He has acknowledged the inappropriateness of a similar kissing incident in 1988, he was subject to a sexual harassment claim, unpursued, in

1985, and he acknowledges entering into a sexual relationship with yet another student while on the faculty of the Northern Maine Vocational Technical Institute in the early 1980's.

With such concessions of misconduct, and more liberal rules of evidence attendant to administrative proceedings or arbitrations, the time and resources devoted to the arbitration appear far in excess of what is necessary to provide essential due process. This is not a reflection on counsel, for all it appears, the case has been litigated competently and creatively. In fact, it may be in a union's general interest to promote such costly and time-consuming arbitrations of grievances. These effectively deter agencies from initiating employee discipline except in the most egregious of

circumstances. Examples of such extended and costly arbitration of employee challenges to employer discipline are not unusual. See. e.g., Augusta Uniformed Firefighters Assn. v. City of Augusta, 600 A.2d 403 (Me. 1991), involving coincidentally, an 11-day arbitration hearing of a city employee who had been discharged in a case where the principle issue was whether the officer stole or had permission to take fish and committed criminal mischief in the taking.

The arbitration award against the employee, Mr. Winston, was not challenged. Instead, after the adverse arbitration finding, Mr. Winston initiated the instant suit. The suit claims, in essence, that Mr. Winston has a disability of sexual addiction aggravated by poor impulse control and that, in discharging Mr.

Winston, the State discriminated against Mr. Winston on the basis of his asserted mental disability in violation of the Maine Human Rights Act, 5 M.R.S.A. §4552 et seq., the United States Constitution as enforced by 42 U.S.C. §1983 and the Rehabilitation Act of 1973, 29 U.S.C. §794.

The State has moved for summary judgment asserting that (1) the arbitration acted as a final determination of these issues and the arbitration determination, unchallenged, bars reconsideration of the same issues before the court, and (2) Mr. Winston's claimed disability of sexual addiction and poor impulse control is not a disability which qualifies for preferential treatment and protections under the various listed civil rights laws.

In oral argument, counsel for the State characterized this issue as whether

a claimed heterosexual addiction qualifies as a disability as a question of "first impression." It is easy to see why. What Mr. Winston is arguing, in essence, is that because he is sexually attracted to women and has poor impulse control due to his psycho-sexual history, his sexually harassing and sexually abusing behavior should be excused and even accommodated by his employer. Nonsense. Much violence and unwelcome sexual contact between humans results from a combination of psycho-social factors and poor impulse control. These acts are human misbehavior. They can be sanctioned accordingly. The definitions of disability under the various civil rights laws are less precise than one might like. However, the court is confident in determining that the sexual harassment which plaintiff committed in this case is

not the result of such a significant impairment of mental condition as qualifies him for protection under the various civil rights laws protecting persons with disabilities.

The State is entitled to summary judgment.

Therefore, the court **ORDERS** and the entry shall be: Defendant's Motion for Summary Judgment **GRANTED**. Judgment for the defendants that the plaintiff is not entitled to relief.

Dated: November 2, 1992

DONALD G. ALEXANDER
JUSTICE, SUPERIOR COURT